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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 718

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.*, CITY OF HIGHLAND PARK, a municipal corporation of Illinois,

Petitioner,

vs.

GEORGE B. McKIBBIN, Director of Finance of the State of Illinois, Successor to A. M. Carter,

Respondent.

PETITIONER'S REPLY to RESPONDENT'S BRIEF

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Respondent's serious, but unwarranted charge that we have misled this Court, is refuted by the Record which shows the following facts:

1. Demand for cash or credit. (Rec. 4)
2. Denial of both cash and credit. (Rec. 5)

3. Complaint for mandamus to compel issuance of a credit. (Rec. 1-6)
4. Denial of mandamus writ. (Rec. 9, 21)
5. Petition for Certiorari filed in this Court. (February 10, 1943)

Petitioner was, and is, seeking a refund of taxes in the form of a credit pursuant to the tax refund provision of the Act under which the tax was paid. (Rec. 3) A tax refund in the form of a credit is a tax refund as much as cash would be a tax refund.

I.

Petitioner has contended that the refusal of the State officials to return taxes collected by duress under a void tax act deprived petitioner of property without due process of law.

Respondent's contentions made under this point are not responsive, because they are arguments as to statutory construction and do not question the fact that petitioner was deprived of property without due process of law. Respondent's points were all raised in the State Courts and are State questions.

II.

As pointed out on page five of our Petition for Certiorari, the Federal question was timely raised in the lower court.

Respondent cites the case of *Trenton* v. *New Jersey* (262 U. S. 182), to support his contention that a municipality is not within the protection of the XIV Amendment to the Constitution of the United States in the pursuit of its private functions.

The Trenton case involved a purely governmental function of the municipality, and is not authority in support of the proposition that a City's private property is subject to unrestricted seizure by a State legislature. Further, the case at bar does not question the power of the legislature but seeks the enforcement of a legislative act—the refund section.

In the Trenton case a license fee or State tax was imposed upon the municipality for the diversion of water from a State waterway. Petitioner does not question the right of the State to impose a lawful tax. Nor does Petitioner question the right of a State to control the public function of a municipality. That the decision in the Trenton case was confined to a governmental function, is supported by the portion of its opinion cited by respondent as follows:

> "The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned. * * *"
>
> *Trenton* v. *New Jersey,* 262 U. S. 182, 188.

That only a governmental function was there involved is supported also by the statement of the Court as follows:

> "The State undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the Act of 1907 was passed pursuant to the policy of the State to prevent waste and to economize its water resources. * * *"
>
> *Trenton* v. *New Jersey,* 262 U. S. 182, 185.

In the case at bar, no legislative control over the municipality in any of its functions is involved. Petitioner does not attack the power of the legislature in this case. To the contrary, petitioner here is predicating its suit solely on the basis of an act of the legislature—the refund section.

By definite contrast to the Trenton case, Petitioner here has had its property illegally appropriated by an official of the executive branch of the State under a void act, (in legal effect no act at all). No question of interference with the legislative power of the State is presented. Petitioner is seeking the enforcement of a legislative act providing for a tax refund.

Petitioner in this cause seeks the recovery of its property in accordance with the legislative mandate contained in the refund section. The failure to so return its property illegally obtained by duress, deprives petitioner of property in violation of the legislative intent and in violation of the due process clause of the XIV Amendment.

While in the Trenton case a purely governmental function was involved, the case at bar involves a private function of a municipality, *i. e.*, the ownership and operation of a public utility. The Trenton case involved the using of water from a State waterway. In case at bar the water plant is owned and operated exclusively by the City for and on behalf of its citizens. It is the collective property of the citizens of the municipality.

It is firmly established that a municipality functions in two capacities: (1) It functions in its governmental capacity in which case it is considered a mere instrumentality of the State, and (2) It functions in a private or proprietary capacity, in which case it is entitled to all rights and privileges and is held to all responsibilities of a private corporation.

The Supreme Court of Illinois has held:

> "'A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. * * * It stands upon the same footing as would any individual or body of persons, upon whom the like special franchises had been

conferred.' Appeal of Brumm, 12 Atlantic Reporter, 855. To same effect see, *Western Savings Fund Society* v. *City of Philadelphia,* 31 Pa. St. 175; *Bailey* v. *Mayor, etc., of New York,* 3 Hill 531."

Wagner v. *City of Rock Island,* 146 Ill. 139, 154-5.

"Municipalities are created primarily for the exercise of such powers of sovereignty as the General Assembly bestows upon them, and the production of water, gas or electricity for all municipal purposes is within the scope of governmental function, but when a municipality goes into the business of furnishing water for sale through contracts made between it and the consumer, which contract the consumer has an option to make or not, as he pleases, such municipality does so not in the capacity of sovereignty but in a private capacity. (*Sanitary District* v. *Carr,* 304 Ill. 120; *Springfield Gas and Electric Co.* v. *City of Springfield,* 292 *id.* 236; *Eastern Illinois State Normal School* v. *City of Charleston,* 271 *id.* 602; *People* v. *Schlitz Brewing Co.,* 261 *id.* 22; *Wagner* v. *City of Rock Island,* 146 *id.* 139.) 'Business' is a very comprehensive term. It has been defined as any particular occupation or employment habitually engaged in expressly for livelihood or gain. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 55 L. ed. 389."

City of Chicago v. *Ames,* 365 Ill. 529, 533.

The rule of law which accords unrestrained control to the legislature over cities, on governmental functions, is beyond dispute. To hold otherwise would dissipate the sovereignty of the State as to all powers granted to the municipality or other divisions of the State government. To bring such governmental functions within the XIV Amendment would destroy the self-government of the State. However, where the municipality holds property or is engaged in a purely private function, the reason for this rule fails, because in such instances there is no State sovereignty concerned. Neither the States nor the United

States have unfettered power to seize, destroy or injure the property of a citizen or corporation of the State. The wrongful seizure by the State of such property does not involve the question of sovereignty. It then becomes a question of abuse of State sovereignty as restricted by the constitution. The rights of the citizens in and to a municipally owned water plant are entitled to the same protection as the rights of other citizens.

As far back as 1815, this Court speaking through Justice Story, in *Pawlet* v. *Clark,* 13 U. S. 292, held that the private property of a municipal corporation could not be appropriated by the State. This principle was reaffirmed in the Dartmouth College case where Justice Story stated:

> "* * * It may also be admitted, that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations, the legislative power is so transcendent, that it may at its will take away the private property of the corporation, or change the uses of its private funds, acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses (as many municipal corporations are), does the legislature, under our forms of limited government, possess the authority to seize upon those funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it.

Terrett v. *Taylor*, 9 Cranch 43; *Town of Pawlet* v. *Clark*, *Ibid.* 292."

Dartmouth College v. *Woodward*, 17 U. S. 517, 694-5.

This principle was again restated in *Hunter* v. *Pittsburgh*, 207 U. S. 161, 179:

> "It will be observed that in describing the absolute power of the State over the property of municipal corporations we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts. (1 Dillon, Municipal Corporations, 4th ed., sections 66 to 66a, inclusive, and, cases cited in note to 48 L. R. A. 465), and it has been held that as to the latter class of property the legislature is not omnipotent. * * *"

This Court has also held that a municipality with an independent financial interest in a controversy is a citizen and can sue and be sued in a Federal Court, although the State has also an interest. (*Port of Seattle* v. *Oregon & W. R. R.* (1920), 255 U. S. 56, 71.)

Again we find in McQuillin on Municipal Corporations, Second Edition, after reviewing this subject for over a hundred pages, the following summary:

> "§ 245 (226). General doctrine stated. It thus appears that, according to the weight of the later judicial decisions (and earlier ones also), municipal corporations may own, in a private or proprietary capacity, property which is viewed by the law as held for the benefit of the inhabitants of the locality free from legislative appropriation or control, and is held by the

local corporation under the security of private rights applicable to individuals.[84] It also appears from the above consideration that the property held by the municipal corporation for the public generally as distinguished from its own inhabitants is subject to control by the legislature.[85]"

McQuillin Municipal Corporations—Second Edition, Revised Vol. 1, Sec. 245 (226), p. 689.

The Illinois Constitution provides in Section 2 of Article 2 that:

"No person shall be deprived of life, liberty or property, without due process of law."

Illinois, by statute, has provided that:

"The word 'person' or 'persons' as well as all words referring to or importing persons, may extend and be applied to parties politic and corporate as well as individuals."

Illinois Revised Statutes (State Bar Edition), Chap. 131, Sec. 1, Fifth.

The Illinois Supreme Court has likewise construed and approved this section. (*The People* v. *Deep Rock Oil Corp.*, 343 Ill. 388, 401-2.)

The very act in the case at bar defines the word "person" to include a municipal corporation as follows:

"§ 440. Terms defined.] Section 1. For the purposes of this Act:—* * * 'Person' means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint adventure, corporation, or a receiver, trustee, conservator or other representative appointed by order of any court, or any city, town, county or other political subdivision of this State. * * *"

Illinois Revised Statutes 1935.

Illinois State Bar Edition, Chap. 120.

The Illinois Supreme Court in the case holding the Utility Act invalid said:

> "The use of the term 'person' in statutory enactments has been held to include municipalities. (*People* v. *Deep Rock Oil Corp.*, 343 Ill. 388; *Ohio* v. *Helvering*, 292 U. S. 360, 78 L. ed. 1307.) * * *"
>
> *City of Chicago* v. *Ames*, 365 Ill. 529, 532.

The City of Highland Park is entitled to the same protection and the same refund as any other private utility owner and should not be deprived of this right because the utility is owned by the citizens of Highland Park instead of being owned by private capital. This is especially true when no question of State sovereignty or powers of the legislature is in issue.

CONCLUSION.

Apparently the only contention of respondent in opposition to our Petition for Certiorari, is that a municipality cannot invoke the protection of the XIV Amendment to the Constitution of the United States. Defendant has cited the Trenton case which involved a governmental function by the municipality, and also State Court decisions which seem contrary to the decisions of the Illinois Supreme Court. Petitioner has cited authority showing that property of a municipality owned for private purpose is not subject to the omnipotent control of the legislature. The proprietary rights of the municipality are similar to those of an individual and are similarly protected. Thus a distinction exists between the facts in the Trenton case and case at bar. Under the novel facts in the present case, no attack is made on the power of the legislature. Petitioner is merely seeking its rights as exhibited in the legislative provision. The wrong complained of is the appropriation

of petitioner's property through the exercise of duress and compulsion by a public official acting under a void statute. No question of legislative power over the municipality is presented in this case. The real issue is whether a municipality is protected against the unlawful act of a public official, performed by him under the guise of a void statute.

It is the contention of petitioner, upon the facts presented, and for the reasons shown, that private property of a municipality is entitled to the protection afforded an individual under the XIV Amendment to the Constitution of the United States.

Respectfully submitted,

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